IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 94 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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BALUBEN BHULABHAI @FULABHAI NAYAK - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
(PRADYUMAN B BHATT) for Appellant(s) : 1,
MS SHILPA R SHAH for Appellant(s) : 1.2.0
MS MS PANCHAL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 31/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The present appellant-original accused

No.1-Baluben Bhulabhai Nayak, of Sessions Case No.193 of 1996, has been convicted for life and fine of Rs.900/-, in default, to suffer RI for six months for the offence under Sec.302 of IPC and to suffer RI for one year and fine of Rs.200/- in default to suffer RI for three months for the offence under Sec.201 of IPC, by the learned Addl. Sessions Judge, Panchmahals at Godhra, vide judgment and order dated 13-1-1997 while present appellant No.2-original accused-Virsing @ Chakabhai Bhulabhai Nayak was acquitted. Being aggrieved and dissatisfied, appellant-original accused No.1-Baluben Bhulabhai Nayak, has preferred the present appeal before this Court.

2. At the time of admission of the appeal, bail was refused by a Division Bench of this Court. However, the appellant was released on bail on 6-4-2000 while deciding Cri.Misc.Appln.No.651 of 2000, pending hearing and final disposal of appeal.

3. The case of the prosecution in short is that on 14-4-1996, when PSO, Ratansinh Bhagvansinh Parmar, was on duty at Halol Police Station, he received a telephone message from one Mahammad Lakkadia at about 12.15 p.m. to the effect that in one of the huts situated on the road leading to Gopipura, dead body of a man is hanging on

the roof. He, therefore, noted down the said information in the station diary and directed police Jamadar, Govindbhai, to inquire into it. Therefore, Govindbhai visited the place of offence. First he opened the door of the hut, then took out dead body and thereafter drew inquest panchnama as well as panchnama of scene of offence in presence of panchas and father of the victim. He also made arrangements for sending dead body of the deceased with police yadi for post mortem. Thereafter, he filed the complaint on behalf of the State against the present appellant and one other accused for the offences punishable under Secs.302, 34 and 201 of IPC. Thereafter, investigation was taken over by PSI, Ranjitsinh Naransinh Gohil, on the same day. PSI, Gohil recorded statements of Keshavbhai Somabhai Solanki, Dahyabhai Somabhai Solanki and other witnesses on 15-4-1996. Thereafter, he arrested both the accused. As the appellant-original accused No.1 produced a bunch of keys, same was seized by way of panchnama. He also recorded statements of various other witnesses. On 23-4-1996, he recorded statement of Mahmmad Lakkadia, the person who gave the telephonic information to PSO, Halol Police Station, regarding the

incident in question. He also made arrangements to prepare map of scene of offence and on receipt of post mortem report, it was kept in investigation file. At the end of investigation, he submitted the charge sheet into the Court against both the accused.

4. As the offence alleged against the accused was exclusively triable by the Court of Sessions, the learned Judicial Magistrate (First Class) committed the case to the Court of Sessions and on receiving the same, it was numbered as Sessions Case No.193 of 1996 and transferred to learned Addl. Sessions Judge, Panchmahals at Godhra for trial. The learned Addl. Sessions Judge framed charge against the accused at Ex.1 on 24-10-1996. The accused pleaded not guilty to the charge and claimed to be tried.

5. To prove the case against the accused, the prosecution examined the following witnesses namely, P.W.1, Kishorebhai Somabhai Solanki Ex.6, who, according to the prosecution, is the person last seen the appellant with the deceased at 8.30 a.m. when he was going towards his field; P.W.2 Dahyabhai Somabhai Solanki Ex.7, who happens to be the brother of P.W.1; P.W.3 Chandubhai Zaverbhai Solanki Ex.8, the

father of the victim; P.W.4 Sanjay Raijibhai Solanki Ex.9, the son of the deceased; P.W.5 Manojkumar Kishorkumar Panchal Ex.15; P.W.6 Dr.Subodhbhai Shaligram Mishra Ex.23; P.W.7 Nasib Yusuf Kureshi Ex.26, the panch of bunch of keys alleged to have been produced by Baluben when she was in police custody; P.W.8 Mahammadbhai Ismailbhai Lakhadia Ex.29, who, according to the prosecution, is the person who informed Halol Police Station over phone and entry has been made in the Station diary; P.W.9 Sureshbhai Rayjibhai Ex.30, another son of the deceased; P.W.10 Bansibhai Ambalal Soni Ex.31, owner of Srinathji Jewellers of Halol; P.W.11 Sanabhai Madabhai Ex.34, panch of panchnama of scene of offence; P.W.12 Amarsinh Bharatsinh Ex.36, panch of inquest panchnama; P.W.13 Ratansinh Bhagvansinh Parmar Ex.38, PSO of Halol Police Station, who received telephone verdhi from Mahammadbhai Ismailbhai Lakhadia at 12.15 p.m. and who made entry in the station diary and directed police Jamadar, Govindbhai, to investigate. P.W.14 Ranjitsinh Naransinh Gohil Ex.42, I.O., who took over investigation from Police Jamadar, Govindbhai, on 14-4-1996 and completed investigation and submitted

charge sheet into the Court. Prosecution also relied upon various documentary evidence namely, inquest panchnama Ex.10; inquest form Ex.11; police yadi Ex.12; map of scene of offence Ex.13; photographs of dead body of deceased Exs.16 to 22; post mortem note Ex.25; panchnama of seizure of bunch of keys Ex.27; cash memo of M/s Shrinathji Jewellers Exs.32 and 33; panchnama of scene of offence Ex.35, etc.

6. On submission of closing purshis by learned APP, learned Addl. Sessions Judge, recorded further statement of the accused under Sec.313 of Cr.P.C. qua incriminating evidence emerged during the course of investigation. As the accused neither stepped into the witness box nor decided to lead any oral evidence nor showed any desire to produce any documentary evidence, learned Addl. Sessions Judge, after hearing the learned counsel appearing for the respective parties, delivered the impugned judgment acquitting the accused No.2 and convicting the appellant-accused No.1 to suffer for life giving rise to the present appeal.

7. Heard learned counsel, Ms.Shilpa R.Shah, for the appellant and learned APP, Ms.M.S.Panchal, for the respondent-State.

8. Learned counsel for the appellant,

Ms.Shilpa Shah has taken us through the oral as well as the documentary evidence in detail along with the reasoned judgment delivered by the court below and argued that case of the prosecution is mainly based on circumstantial evidence. Taking us through the circumstances narrated by the court below in the judgment at page 12 para 24, it is argued that prosecution has failed to prove the chain of circumstances and, therefore, court below ought to have acquitted the appellant-accused. Though the complaint has been filed by Police Jamadar, Mr.Govindbhai, on behalf of the State, he has not been examined by the prosecution and hence, according to her, complaint has not been proved. Showing us the station diary, it is argued that entry in the station diary is a general entry wherein no name of either the accused or the victim has been mentioned and, therefore, entry in the station diary i.e. telephone verdhi cannot be treated as the FIR. It is further argued that the prosecution has tried to establish the link of last seen together through the evidence of prosecution witnesses Nos.1 and 2 i.e. Keshavbhai Somabhai Solanki and Dahyabhai Somabhai Solanki. If their evidence is believed in toto as the witnesses of last seen

together, then also, no evidence to that effect has been produced by the prosecution nor was there any deposition to that effect made by these witnesses and hence, according to her, they are not the witnesses of last seen together but are got up witnesses. It is further argued that as per the case of the prosecution, the appellant was arrested from a different Village and hence, it is to be presumed that the appellant was not in the Village when the incident took place. According to her, if at all it is believed that there was a relation between the appellant and the deceased, it was a cordial relation. In this regard, she took us through the cash memo Exs.32 and 33 issued by Shrinathji Jewellers and argued that on the day before the incident, certain ornaments were purchased by the deceased for the appellant and, therefore, it cannot be said that it is she who killed the victim. Moreover, there was no other evidence to show that on the day of incident, any quarrel took place between the victim and the appellant. On the contrary, at the most, if we believe the say of the prosecution to be true, then also, the star witnesses of the prosecution have only deposed that when they were passing on the road, they saw the victim

and the appellant discussing on the road in front of the hut. Except that, there are no other evidence to connect the appellant with the crime in question. Apart from that, other witnesses have also not supported the say of the prosecution. Mr.Mahammadbhai Ismailbhai Lakhadia, who telephonically informed the police, also did not depose anything connecting the appellant with the crime in question. It is further argued that though the incident is a homicidal death, prosecution has failed to connect the accused with the crime in question. According to her, the facts tried to be established by the prosecution are not believable because as per the prosecution case, lastly both the victim and the appellant were found in front of the hut and within half an hour, the alleged incident has taken place. Even if we believe the say of the prosecution that the victim was killed by her and then kept him in hanging position on the roof, then also, she being a lady cannot do this act on her own. Taking us through the panchnama of scene of offence, she has argued that there are two doors and there were gaps in between the huts which would enable anyone to have an easy access in the hut. One can enter into the hut through roof also. In

these circumstances, it cannot be said that it is the appellant who has committed the offence in question. Since none of the circumstances narrated by the court below are proved by the prosecution, it is prayed that the judgment and order of conviction passed against the appellant be quashed and set aside and the appellant be set at liberty forthwith.

9. Ms.Panchal, learned APP, has mainly argued that the judgment and order of the court below are well reasoned. All the circumstances have been narrated by the court below as having been properly proved by the prosecution. The evidence of last seen together has also been proved by the prosecution through prosecution witnesses Nos.1 and 2, Kishorebhai Somabhai Solanki Ex.6 and Dahyabhai Somabhai Solanki Ex.7 as there were no other evidence of last seen together thereafter. Moreover,the appellant could not give any satisfactory explanation of not having committed the offence in question and hence, court below has rightly convicted her. She has taken us through other evidence indicating that even bicycle of the deceased was seen very near to the hut on the road. Not only that, showing us the cash memo Exs.32 and 33, she argued that the appellant and the victim had a

relation since last 10 years and it is the last evidence connecting her with the crime. Once it has been established that this is a case of homicidal death and the body of the victim has been found hanging on the roof, then other circumstances automatically connect the appellant accused with the crime in question and, therefore, she requested that the appeal be dismissed.

10. We have gone through the oral as well as the documentary evidence shown to us by the learned counsel for the parties together with the judgment and order delivered by the court below. We have also gone through the circumstances narrated by the court below in para 24 of the judgment.

11. The first circumstance narrated by the court below is that the hut is belonging to and of the ownership of the appellant. However, learned APP, Ms.Panchal, has failed to show from the record any evidence to that effect. As such, there are no evidence on record to prove that hut is belonging to the appellant.

12. The second circumstance is regarding the position of the dead body when it was found. This is for the purpose of proving the aspect of homicidal death and has nothing to do with other circumstances.

13. The third circumstance narrated by the

court below is that door of the hut was locked from outside. It is clear from the record and proceedings that there are other doors also to enter into the said hut. Moreover, there is a gap of 2 feet and 4 inches between two huts and hence, anybody can have enter into the hut. As far as the key of the lock of the hut is concerned, it is the say of the prosecution that lock was opened from one of the bunch of keys produced by the appellant while she was in custody. However, evidence on record shows that prior to that, lock was broke open when dead body was taken out and thereafter, when the appellant accused was arrested, she produced the bunch of keys, one of which was of the lock allegedly broke open. However, there is no evidence on record to show as to who was in possession of key of the said lock. On the contrary, it has been established that lock has been broke open by the police well before the bunch of keys was produced by the appellant. Hence, this circumstance also is not supporting the say of the prosecution.

14. Another circumstance narrated by the court below is that the victim had an illicit relation with the appellant, they were staying together and the appellant was

being kept as the kept by the victim. Sons of the victim deposed in one line that their father had a relation with the appellant. Even father of the victim had also deposed on the same line. Except that, there are no other evidence indicating the relation between the victim and the appellant. If we believe that they had a relation or they were friends, then also, the thing which has been established from the evidence on record is that till last day, they had a cordial relation. If we believe the say of the prosecution that victim has purchased silver ornaments for the appellant vide cash memo issued by Shrinathji Jewellers Exs.32 and 33, then also, it can be seen that they were standing on the road in front of the hut and, therefore, merely because they were friends, she cannot be involved into the crime in question in absence of any other cogent material evidence on record indicating her involvement.

15. The next circumstance narrated by the court below is that bicycle belonging to victim was found very near to the house of the scene of offence. We have asked specific question to learned APP to show us from the record as to whether any evidence to that effect is comingforth or not. She has

fairly admitted that there are no evidence worth the name to show that bicycle was there and it was seized from very near to the scene of offence. In absence of that, the above finding of circumstance is also without any basis. On the contrary, it has been established from the evidence of sons of the victim that cycle was at their residence.

16. The last circumstance narrated by the court below is that after killing the victim, the appellant has kept the dead body in hanging position on the roof, closed the door of the hut from outside by applying the lock and then left the Village. However, facts remain that there are no evidence to that effect also on record and hence, said finding also appears to be without any basis.

17. In short, the circumstances which were narrated by the court below are not on the basis of any evidence on record but only on the basis of assumption and presumption. It has been rightly argued by the learned counsel for the appellant that it is not the work of only one person and that too of a lady to kill and hang the dead body on the roof and then leave the hut in a normal manner. That being so, the accused No.2 has been acquitted by the court below on the

same ground but not acquitted the appellant only on the ground of assumption that she had a relation with the victim. Merely because the appellant had a relation with the victim, it cannot be taken for granted to be the reason for killing her friend. On the contrary, it goes against the prosecution as rightly argued by the learned counsel for the appellant. Not only that, even complainant has not been examined so as to prove the complaint and hence, it can be said that complaint has not been proved. Further, though verdhi has been exhibited, it is cryptic in nature wherein Mahammadbhai Ismailbhai Lakhadia has only informed that one dead body was seen hanging on the roof in one of the huts and the said hut was locked from outside. Except that, there are no other evidence to connect the appellant accused with the crime in question.

18. In absence of any evidence on record connecting the appellant-accused No.1 with the crime in question, we can safely hold that though the unfortunate incident has taken place, the appellant would not be held liable for the said incident more particularly when most of the witnesses did not support the say of prosecution. No dispute could be pointed out as existing

between the deceased and the appellant for the alleged incident and hence, no motive could be established by the prosecution for the appellant to commit the murder of the victim. Hence, we hold that the offence in question has not been proved by the prosecution against the appellant and hence, this appeal is required to be allowed and the impugned judgment and order of conviction against the appellant is required to be quashed and set aside.

19. This appeal is allowed. The impugned judgment and order dated 13-1-1997 passed by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.193 of 1996 convicting the appellant are quashed and set aside. The appellant-accused Baluben Bhulabhai @ Fulabhai Nayak is ordered to be set at liberty forthwith, if not required in any other case. The appellant is on bail and hence, her bail bond shall stand cancelled.

(R.P.DHOLAKIA,J.)

(S.D.DAVE,J.)

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